



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

SECOND SECTION

CASE OF TALABÉR v. HUNGARY

(Application no. 37376/05)

JUDGMENT

STRASBOURG

29 September 2009

FINAL

29/12/2009

This judgment may be subject to editorial revision.

In the case of Talabér v. Hungary,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Vladimiro Zagrebelsky,

Danutė Jočienė,

Dragoljub Popović,

András Sajó,

Nona Tsotsoria, *judges*,

and Françoise Elens-Passos, *Deputy Section Registrar*,

Having deliberated in private on 8 September 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 37376/05) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Hungarian national, Mr Attila József Talabér (“the applicant”), on 6 October 2005.

2. The applicant was represented by Mr Á. Békés, a lawyer practising in Budapest. The Hungarian Government (“the Government”) were represented by Mr L. Hölzl, Agent, Ministry of Justice and Law Enforcement.

3. The applicant alleged that his conviction had been upheld without him or his lawyer attending the session in the appellate court, in breach of Article 6 §§ 1 and 3 of the Convention.

4. On 24 April 2008 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1953 and lives in Budapest.

A. The circumstances of the case

6. In November 2003 the Budapest I/XII District Public Prosecutor charged the applicant with disorderly conduct and vandalism, punishable by three years of imprisonment.

7. The Budapest Central District Court held hearings on 22 January, 28 March and 28 April 2004. On the latter date it found the applicant guilty of vandalism and fined him 90,000 Hungarian forints (HUF) (approximately 337 euros (EUR)). The District Court relied on documentary evidence, the opinion of an expert, and the testimony of witnesses and the applicant.

8. The applicant appealed, seeking acquittal on the ground that the judgment was ill-founded, and requested the court to hold a public hearing. The Budapest Chief prosecutor also appealed, and requested the court to quash the first-instance judgment and remit the case to the District Court because of shortcomings in the finding of facts.

9. The Budapest Regional Court notified the applicant's lawyer that it would determine the appeal sitting *in camera*. In reply, the lawyer put forward supplementary arguments and again requested the court to hold a public hearing.

10. On 7 April 2005 the Regional Court held a session *in camera* and upheld the applicant's conviction. The applicant, his lawyer and the prosecutor were absent.

11. The Regional Court reviewed the entirety of the proceedings and established their lawfulness. Furthermore, it considered that the findings of fact by the first-instance court were not ill-founded within the meaning of section 351(2) of the New Code of Criminal Procedure, and were thus suitable for an appellate review without taking further evidence.

12. However, the Regional Court, relying on the existing case file, modified the findings of fact as established by the first-instance court. When delivering its judgement, it relied on the modified facts.

B. Relevant domestic law

13. Act no. XIX of 1998 on the [New] Code of Criminal Procedure provides, in so far as relevant, as follows:

Section 346

“... (3) An appeal may concern questions of fact or law.”

Section 351

“(1) The second-instance court shall base its decision on the facts as established by the first-instance court unless the first-instance judgment is ill-founded....

(2) The first-instance judgment is ill-founded if:

- a) the facts have not been explored;
- b) the first-instance court has failed to establish the facts or the findings of fact are deficient;
- c) the findings of fact are in contradiction with the contents of the documents;
- d) the first-instance court has drawn incorrect conclusions from the findings of fact in regard to a further fact.”

Section 353

“... (2) In order to eliminate the ill-foundedness of the first-instance judgment, evidence may be taken if the findings of fact have not been established or are deficient. Evidence shall be taken ... at a hearing.”

Section 360 (as in force until 26 May 2005¹)

“(1) Within 30 days of receiving the file, the president of the panel in charge shall schedule, in order to deal with an appeal, deliberations *in camera* (*tanácsülés*), a public session (*nyilvános ülés*) or a hearing (*tárgyalás*). ...”

Section 361

“(1) The second-instance court shall hold a public session, if – the first-instance judgment being ill-founded – the complete and/or correct findings of fact may be established from the contents of the file or through drawing factual conclusions, or if the defendant must be heard in order to clarify the circumstances relevant for imposing the sentence.

(2) The second-instance court shall summon to the public session those persons whose hearing it deems necessary ...”

¹ On that date the Constitutional Court annulled this provision as being unconstitutional.

Section 362

“(1) The second-instance court shall notify the public prosecutor and – if they are not summoned – ... the defendant and his lawyer of the public session. ...”

Section 363

“(2) In order to take evidence, a hearing (*tárgyalás*) ... shall be scheduled.”

Section 405

“(1) The court’s final decision on the merits is susceptible to a [Supreme Court] review (*felülvizsgálat*) if ...

c) the decision has been adopted amidst procedural irregularities within the meaning of section 373(1) subparagraphs II to IV.”

THE LAW**I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION (ABSENCE OF A PUBLIC HEARING)**

14. The applicant complained that his conviction had been upheld by the appellate court sitting *in camera* without him or his lawyer being present, in violation of his defence rights guaranteed by Article 6 §§ 1 and 3 of the Convention. Article 6 provides, in so far as relevant:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by a ... tribunal. ...

3. Everyone charged with a criminal offence has the following minimum rights: ...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...”

15. The Government contested that argument.

A. Admissibility

16. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

17. The applicant stressed that his right to a fair trial had been impaired by the fact that the second-instance court had upheld his conviction sitting *in camera*.

18. The Government maintained that both the principle of adversarial procedure and that of ‘equality of arms’ had been observed in the case, since the applicant and his defence counsel had had the opportunity to study the statements and evidence submitted by the public prosecutor and to address the witnesses and the experts. All in all, he was not deprived of the procedural means which were also available to the prosecution.

19. Referring in particular to the *Constantinescu v. Romania* judgment (no. 28871/95, § 55, ECHR 2000-VIII), the Government emphasised that the first issue to be addressed was whether the Regional Court was to try questions of law or fact, that is whether it was to review the case against the applicant in its entirety. In this connection, it is to be noted that the appellate court’s reformatory powers are very limited, in that it decides on the basis of the facts as established by the first-instance court and does not take evidence, unless the first-instance judgment is ill-founded and its factual shortcomings can be remedied without extensive evidence being taken. If, however, the latter is necessary, the appellate court quashes the first-instance judgment and instructs the lower court to resume the proceedings and complete the findings of fact, or take evidence anew.

20. The Government emphasised that, in the present case, the Regional Court had neither considered the first-instance judgment ill-founded nor had found it necessary to take evidence or to hear the applicant. The applicant’s case had not presented special circumstances requiring the defendant to be heard by the appellate court, unlike other cases which the Court has dealt with (cf. *Constantinescu v. Romania*, *op. cit.*, § 58; *Botten v. Norway*, judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, § 50). Neither the character of the offence nor the nature of the evidence had imperatively required the applicant to be heard by the appellate court: his credibility had not been decisive in assessing the evidence. Lastly, the Government pointed out that the appellate court, unlike the above-mentioned cases where the second-instance court had found the defendants guilty the first time, had simply reviewed the first-instance judgment which

had already convicted the applicant. In these circumstances, holding a public hearing had not been necessary.

21. The applicant maintained that even if ‘equality of arms’ had been observed in the case in that neither he nor the prosecution had been present in the second-instance proceedings, this did not render the proceedings fair as a whole, since a court may dispense with a hearing only if the defendant waives this right. Since in the instant case he had requested a hearing and the Regional Court was entitled to decide on questions of both facts and law, a public hearing should have been held in order for the requirements of Article 6 to be met.

22. The applicant also stressed that the judgment of the Regional Court upholding the first-instance verdict was a decision on the merits. Since it was delivered *in camera*, it in fact reduced the trial to a single-instance proceeding. Lastly, the applicant referred to the Court’s case-law requiring the same safeguards to be implemented during the appellate trial as during the first-instance proceedings, in particular the obligation to hold public hearings.

23. The Court constantly held that an oral and public hearing constitutes a fundamental principle enshrined in Article 6 § 1. This principle is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 (see *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, § 79) and where an applicant has an entitlement to have his case “heard”, with the opportunity *inter alia* to give evidence in his own defence, hear the evidence against him and examine and cross-examine the witnesses.

24. The Court would not exclude that in the criminal sphere the nature of the issues to be dealt with before the tribunal or court may not require an oral hearing. Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma (see *Jussila v. Finland* [GC], no. 73053/01, § 43, ECHR 2006-...).

25. However, the Court is of the view that, in the determination of criminal charges, the hearing of the defendant in person should nevertheless be the general rule. Any derogation from this principle should be exceptional and subjected to restrictive interpretation. The absence of an oral hearing at second instance has led to violations in several criminal cases (see *Ekbatani v. Sweden*, 26 May 1988, § 25, Series A no. 134; *Helmers v. Sweden*, judgment of 29 October 1991, Series A no. 212-A, §§ 31–32; *Kremzow v. Austria*, judgment of 21 September 1993, Series A no. 268-B, §§ 58–59; *Botten v. Norway*, cited above, § 39; *Belziuk v. Poland*, judgment of 25 March 1998, *Reports* 1998-II, §§ 38 to 40; *Constantinescu*, cited

above; *Sigurþór Arnarsson v. Iceland*, no. 44671/98, § 30, 15 July 2003; and *Csikós v. Hungary*, no. 37251/04, ECHR 2006-... (extracts)).

26. It is true that in the case of *Fejde v. Sweden* (judgment of 29 October 1991, Series A no. 212-C, § 33), no violation of the applicant's defence rights was found, although no oral hearing had taken place before the appellate court. However, in the Court's view, this was a justified exception from the above general rule, considering the minor character of the offence with which he had been charged and the prohibition against increasing his sentence on appeal.

27. The Court is however convinced that the present application does not concern the exceptions set out in the cases of *Fejde* and *Jussila* and that the general rule obliging the second-instance courts to hold a hearing must be applied. It takes this view notably because the charges against the applicant – disorderly conduct and vandalism – indisputably belong to the core criminal law. Furthermore, what was at stake for the applicant was imprisonment, even if the actual sentence was only a fine; therefore it carried a significant degree of stigma.

28. Moreover, since on appeal the applicant had sought his acquittal, for the Court the importance of credibility also arose in view of the nature of the offences in question. Consequently, the considerations relied on by the Regional Court were capable of raising issues including such matters as the applicant's personality and character, therefore, he should have been heard directly (see *Kremzow*, cited above, § 67). The Court also notes that the applicant expressly requested that a public, oral hearing be held before the appellate court.

29. The Court notes that the Regional Court conducted a full review and determined the applicant's guilt anew. It draws special attention to the fact that the appellate court modified the finding of facts of the first-instance court and relied on a new factual basis. It is irrelevant in this respect that, as a result of this complete reconsideration, the Regional Court came to the same conclusion as the first-instance court and upheld its judgment without changing it on the merits. In sum, the Court is not persuaded that dispensing with a hearing at second instance had been in compliance with the requirements of a fair trial.

30. Accordingly, there has been a violation of Article 6 § 1 read in conjunction with Article 6 § 3 (c) of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

31. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

32. The applicant claimed HUF 90,000 for pecuniary damage (the amount of the fine imposed on him) and HUF 300,000 (approximately EUR 1,125) for non-pecuniary damage as just satisfaction.

33. The Government considered the applicant’s claims excessive.

34. The Court rejects the claim for pecuniary damage but considers that the applicant must have suffered some non-pecuniary damage. Accordingly, on the basis of equity, it awards him EUR 1,000 under this head. Moreover, it notes that where an individual, as in the instant case, has been convicted by a court in proceedings which did not meet the Convention requirement of fairness, a retrial, a reopening or a review of the case, if requested, represents in principle an appropriate way of redressing the violation (see, *mutatis mutandis*, *Öcalan v. Turkey* [GC], no. 46221/99, §§ 207-210, ECHR 2005-IV).

B. Costs and expenses

35. The applicant claimed HUF 360,000 (approximately EUR 1,350) for the costs and expenses incurred before the Court. He submitted a detailed statement of the hours billable by his lawyer, corresponding to 13.5 hours of work (3 hours for client consultations, 1.5 hours for studying the file, 2.5 hours for case-law research and 6.5 hours for the preparation of submissions) spent by his lawyer on the case, charged at an hourly rate of the equivalent of EUR 100 in Hungarian forints.

36. The Government contested the claim.

37. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum claimed in full.

C. Default interest

38. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 read in conjunction with Article 6 § 3 (c) of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into Hungarian forints at the rate applicable at the date of settlement:
 - (i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,350 (one thousand three hundred and fifty euros) plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 29 September 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos
Deputy Registrar

Françoise Tulkens
President